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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149

COMMENTS

Sprint Corporation hereby respectfully submits its comments in the above-captioned proceeding in response to questions issued by the Commission on April 3, 1997 (Public Notice DA 97-666). In this proceeding, the Commission is reconsidering its decision in its *First Report and Order* in this docket (FCC 96-489, released December 24, 1996) that section 272(e)(4) of the Act is not a grant of authority for a BOC to provide interLATA services prior to receiving section 271 authority, or to provide interLATA services, including wholesale interLATA services provided to its interLATA affiliate, after receiving section 271 authority. Sprint addresses each of the Commission's questions *seriatim*.

1. Section 272(a) states, among other things, that BOCs ''may not provide'' directly ''[o]rigination of [in-region] interLATA telecommunications services.'' Before the court, the BOCs argued that their reading of section 272(e)(4) does not conflict with section 272(a) because when a BOC provides in-region interLATA telecommunications services on a wholesale basis, it does not ''[o]riginat[e]'' such services. We seek comment on what precisely it means to ''originate'' an interLATA telecommunications service. Is ''origination'' strictly a retail concept? Commenting parties should also discuss the legal implications, if any, of the fact that section 271(b)(1), which prohibits a BOC or its affiliate from providing ''interLATA services originating in any of its in-region States'' prior to FCC approval, also uses a form of the term ''originate.''

Section 272(a) prohibits the BOCs from providing in-region interLATA telecommunications services, with a few specified exceptions, except through a separate affiliate, for which prior Commission approval must be obtained pursuant to section 271(b)(1). Any argument that section 272(e)(4) constitutes an independent grant of authority for a BOC to provide in-region interLATA services without prior section 271 authority does not withstand scrutiny. This reading of section 272(e)(4) is in direct conflict with the explicit requirements of section 272(a). The safeguards mandated by the Act in sections 272(a) and 271(b)(1) would be eviscerated if the BOCs were allowed to enter the in-region interLATA market on an unfettered basis under section 272(e)(4).

Rather than constituting *carte blanche* entry into the in-region interLATA market, section 272(e)(4) may more reasonably be interpreted as setting forth the conditions under which a BOC may provide to its affiliate those interLATA and intraLATA facilities and services which the BOC is otherwise allowed to provide directly (*i.e.*, without an affiliate) under section 272(a)[1] - that is, a BOC may provide authorized services to its affiliate only at the same rates, terms and conditions as would be available to unaffiliated entities. Read this way, section 272(e)(4)

[1]Services the BOC is allowed to provide its retail customers include certain specified incidental interLATA services, certain specified out-of-region services, and certain services previously authorized under the MFJ. A BOC may choose to offer these, or any other, services through its affiliate rather than directly to avoid the appearance of anti-competitive activity or for other business reasons.

flows logically after sections 272(e)(1), e(2) and e(3), all of which impose other nondiscrimination safeguards on the BOC and its affiliate. This interpretation of section 272(e)(4) also is consistent with well-established principles of statutory construction, which require the Commission to read section 272 so as to give meaning to all of its different provisions and to thereby carry out the intent of the section as a whole.[2] This is the only reading of section 272(e)(4) which does not nullify the requirements of section 272(a).

Given the above analysis, it is clear that the Commission was entirely correct when it concluded that

> interpreting section 272(e)(4) as an immediate and independent grant of authority that allows BOCs to provide ''interLATA or intraLATA facilities or services'' even where such provision is prohibited by other sections of the statute, would contravene the requirement of section 271 that BOCs receive Commission approval prior to providing these services.

First Report and Order, para. 262, footnotes omitted.

Apparently recognizing the absurdity of the argument that section 272(e)(4) is an independent grant of authority which allows the BOCs to provide in-region interLATA services without section 271 approval, certain BOCs have put forth an alternative interpretation: that after section 271 approval is obtained, section 272(e)(4) allows the BOCs to provide in-region interLATA services directly, rather than through a separate affiliate, by providing such services on a wholesale basis. This argument is

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[2] *See, e.g., King v. St. Vincent's Hospital*, 112 S.Ct. 570, 574 (1991); *U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 113 S.Ct. 2173, 2182 (1993).

simply a tortured effort to circumvent the Act's explicit requirements governing BOC entry into the in-region interLATA market and should be dismissed.

To argue, as do certain of the BOCs,[3] that a provider of wholesale telecommunications services does not ''originate'' such service, makes no sense. If a BOC provides a service, it must originate it; otherwise, there would be nothing for which it could assess a charge and no way to determine the jurisdiction of the service provided. What is relevant here is the origination of the service provided by the BOC, not the origination of the service provided by the affiliate or the origination of a call by an end user. Webster's New Collegiate Dictionary (150th Edition, 1981) defines ''originate'' as ''to give rise to; initiate; to take or have origin; begin.'' This definition clearly applies to the telecommunications service provided to the BOC.

Moreover, allowing the BOCs to provide wholesale telecommunications directly is an exception to the separate affiliate rule of such significance that it is highly improbable that such exception would not be explicitly spelled out. Elsewhere in the Act, Congress differentiated between telecommunications services provided on a wholesale versus retail basis (*see, e.g.*, section

[3] Bell Atlantic and Pacific Telesis first raised this argument in their ''Reply in Support of Motion for Summary Reversal and Response to Motion for Remand'' in their appeal of the *First Report and Order (Bell Atlantic Telephone Companies, Bell Atlantic Communications, Inc., and Pacific Telesis Group v. FCC and United States of America*, Case No. 97-1067). This argument was presented without any support (and, as discussed below, such support is not possible because there is no statutory basis for this argument) and appears to have been added as an afterthought.

251(c)(4), which requires ILECs ''to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers'').[4] Had Congress intended to allow the BOCs to provide in-region interLATA telecommunications services directly (*i.e.*, on a wholesale basis), it is reasonable to assume that it would have made such intent explicit and drawn a wholesale/retail distinction in section 272(e)(4) just as it did in section 251(c)(4).

There is no statutory basis for asserting that ''origination'' is strictly a retail concept. As noted above, Congress clearly was aware of the difference between ''retail'' and ''wholesale'' telecommunications services. The fact that it did not use either of these terms in section 272(a)(2)(B) would seem to indicate that Congress did not intend for the word ''origination'' in this section to be used as a synonym for ''provision on a retail basis.'' It is more logical to consider ''origination'' here as a term used in contrast to ''termination'' (since, under section 271(b)(4), a BOC and its affiliate are allowed to provide termination for interLATA services subject to subsection (j)).

[4] As the Commission correctly pointed out (*First Report and Order*, para. 264), ''[t]his language implicitly recognizes that some telecommunications services are wholesale services. If this were not the case, the qualifying phrase 'that the carrier provides at retail' would be superfluous.''

2. What is the legal significance, if any, of the fact that section 272(e)(4) applies to intraLATA services and facilities as well as interLATA services and facilities? Before the court, for example, AT&T argued that the use of the term ''intraLATA'' demonstrates that section 272(e)(4) is not a grant of authority because, among other things, ''a BOC needs no grant of federal statutory authority to provide intraLATA services.''

Sprint agrees with AT&T's analysis. The FCC does not have general jurisdiction over the BOCs' provision of intraLATA services and thus could not grant the BOCs authority to provide such services or dictate the terms under which such services would be provided.

Under section 271, a separate affiliate is required only for the provision of certain interLATA (not intraLATA) services and facilities. Reading section 272(e)(4) as allowing the BOC to provide to its affiliate already authorized services (fn. 1 *supra*) is consistent with the more relaxed standard applicable to the provision of intraLATA services. In other words, less stringent safeguards (*i.e.*, nonstructural and accounting safeguards as opposed to separate affiliates) are required when the BOC provides services which have already been scrutinized and found to present less of an opportunity for anti-competitive activity -- intraLATA services, certain specified incidental interLATA services (*e.g.*, audio and video programming), out-of-region services, and activities previously authorized under the MFJ. Section 272(e)(4) is simply one of a series of curbs on discrimination; it is not a grant of interLATA or intraLATA authority.

3. Are the principal concerns that underlie the separate affiliate requirement of section 272 - discrimination and cost misallocation by a BOC - less serious in the context of the wholesale provisioning of in-region interLATA services to affiliates than in the context of the direct retail provisioning of such services, at least where, as here, any such provisioning is required to take place in a non-discriminatory manner? If they are less serious, are they nonetheless serious enough to justify, as a policy mater, prohibiting such wholesale provisioning? Of what relevance, if any, is the fact that there was no exception to the interLATA services restriction contained in the MFJ for wholesale interLATA services provided on a non-discriminatory basis, or that there presently is no wholesale interLATA services exception to section 271's prohibition on the provision of in-region interLATA services prior to FCC approval? At the same time, of what relevance, if any is the fact that once a BOC has received section 271 approval and its interLATA affiliate is permitted to provide in-region interLATA services, the 1996 Act also allows the BOC to provide its interLATA affiliate various wholesale services and facilities, such as wholesale access services and wholesale access to unbundled network elements, so long as the BOC does so in a non-discriminatory way and in arm's length transactions? What is the policy justification for not permitting the BOC to provide, in addition, wholesale interLATA services to its affiliate?

Sprint believes that there is real potential for discrimination and cost misallocation in the BOCs' provision of both wholesale in-region interLATA services to their affiliates, and retail provision of such services. For example, nonaffiliated entities which rely upon the wholesale services of the BOC will be placed at a direct competitive disadvantage if the BOC's affiliate is able to obtain those same wholesale services at better rates, terms and conditions (*i.e.*, if the BOC is able to discriminate in favor of its affiliate). Where the unaffiliated entity competes head-to-head (*i.e.*, on a retail basis) with a BOC, there is a threat that the BOC will attempt to cross-subsidize the rates for its competitive service with revenues from its less competitive services. The anti-competitive consequences of such discrimina-

tion and cost misallocation are at least as serious when they occur in the wholesale context as when they occur in the retail context. Reading section 272(e)(4) as a prohibition against discrimination by the BOCs, whether they are providing previously authorized services through a separate affiliate, or providing wholesale access services and wholesale access to unbundled network elements (after grant of section 271 approval) to their separate affiliate, is consistent with the recognition that discrimination and cost misallocations can occur and must be protected against.

The fact that discrimination and cost misallocation are prohibited by the Statute does not mean that they never occur. The Commission's experience with attempting to devise a reasonable basis for allocating joint and common costs, and its difficulties in resolving misallocations identified through the audit process, demonstrate that cost misallocations remain a very real threat. A separate affiliate makes discrimination and cost misallocations easier to detect; it does not eliminate the incentive or the ability of the BOC to engage in such activities.

That section 272(e)(4) should not be read as an independent grant of authority for the BOCs to provide wholesale interLATA services until the Commission grants section 271 approval is bolstered by the lack of such authorization under the MFJ and under section 271 of the Act. Under section 271(f), a BOC and its affiliate are allowed to continue to engage in any activity authorized under the MFJ as of the date of enactment of the Telecommunications Act of 1996. The BOCs were not authorized under

the MFJ to provide interLATA services on a wholesale basis, presumably due to concerns about the potential for discrimination and cost misallocation. Section 271(a) prohibits the BOCs and their affiliates from providing interLATA services except as provided in section 271; this section does not include a wholesale interLATA services exception prior to FCC approval.

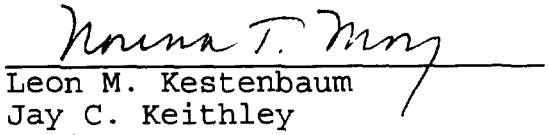
4. Does the extent of concern for discrimination and cost allocation depend, at least in part, on the particular kind of in-region wholesale interLATA service a BOC seeks to offer? For example, does the extent of concern differ depending on whether the wholesale service being offered is a bundled end-to-end interLATA service or an interLATA service that merely transmits traffic from a point of presence in one LATA to a point of presence in another LATA? How would the non-discrimination requirement in section 272(e)(4) apply to these different kinds of wholesale interLATA services? Are there some kinds of services that, in practice, would not be provided in a non-discriminatory manner? In their comments, BOCs should clarify precisely what kind of wholesale interLATA service they would seek to provide, if any, using the excess capacity on their official services networks.

The probability of competitive abuse is directly correlated to both the type and quantity of services and facilities provided by the BOC to its affiliate. The more wholesale services the BOC provides to its affiliate, the greater is the likelihood of discrimination and cost misallocation. If the BOC's and the affiliate's operations are closely integrated, with the BOC providing bundled end-to-end service to its affiliate, there will be more joint and common costs to allocate (or misallocate) and more opportunities for the BOC to give its affiliate preferential treatment. Similarly, if the affiliate obtains a large quantity of services or facilities from the BOC, there is a correspondingly strong incentive for the BOC to provide such services and

facilities on preferential rates, terms and conditions. In contrast, the fewer services or facilities a BOC provides to its affiliate, the more that affiliate resembles an independent entity.

Respectfully submitted,

SPRINT CORPORATION



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April 17, 1997

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing COMMENTS OF SPRINT CORPORATION was Hand Delivered or sent by United States first-class mail, postage prepaid, on this the 17th day of April, 1997 to the below-listed parties:

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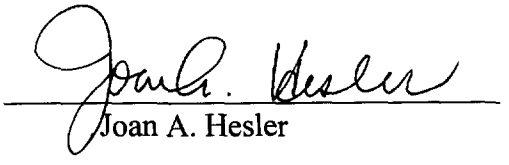

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